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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRUDY UNGER,

Petitioner,

v.

CONSOLIDATED FOODS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit erred on remand by holding that this Court's decision in *Kremer* v. *Chemical Construction Corporation,* 456 U. S. 461, 102 S. Ct. 1883 (1982) mandated that the final judgment of the Illinois Appellate Court on Petitioner's claims of discrimination be accorded preclusive effect in the federal courts, or by holding that no exception to the general principle of retroactivity was warranted herein?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Consolidated Foods Corporation[1] respectfully urges that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinions below are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are set forth in the Petition for Writ of Certiorari.

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[1] Pursuant to Rule 28.1 of the Rules of this Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondent Consolidated Foods Corporation: Douwe Egberts, N.V.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, 28 U.S.C. § 1738, which provides as follows, also is involved:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

On October 2, 1972, Petitioner Trudy Unger filed a charge with the Illinois Fair Employment Practices Commission ("FEPC"), alleging that Respondent Consolidated Foods Corporation unlawfully had discharged her on May 31, 1972 because of her sex. Thereafter, Petitioner, who had been rehired by Respondent on August 1, 1972, filed a second charge with the FEPC, alleging that she had been terminated a second time on October 16, 1972 in retaliation for filing the first charge.

Petitioner's charges were investigated by the FEPC and a complaint was issued. Subsequently, six (6) days of hearings were held before a Hearing Examiner appointed by that

agency, resulting in a record consisting of more than eleven hundred (1100) pages of documentary evidence and testimony. At the hearing, both parties were represented by counsel, all testimony was taken under oath, and a stenographic transcript of the proceedings was made. Further procedural safeguards included the applicability of the rules of evidence used in the Illinois courts and the availability of compulsory process. *See,* Rules and Regulations of the Illinois Fair Employment Practices Commission (issued pursuant to Ill. Rev. Stat. Ch. 48, § 856.05); *Unger* v. *Consolidated Foods Corporation,* 693 F. 2d 703, 705 (7th Cir. 1982). After the Hearing Examiner made a recommended decision, further briefs were submitted to the FEPC and the case was argued orally before that body.

On February 10, 1975, the FEPC issued a sixteen (16) page decision, in which it sustained Respondent's substantive position and ordered the charges dismissed. The FEPC found that Petitioner had been terminated as part of a sales reorganization during which five (5) male salespersons also had been terminated and, indeed, that Petitioner had received greater consideration than the male salespersons who were terminated because she was the only salesperson subsequently rehired. Further, the FEPC found that, viewed as a whole, the record established that Petitioner's second termination resulted from her failure to perform her job, rather than retaliation.

Plaintiff appealed the FEPC's decision to the Circuit Court of Cook County which, following submission of briefs and oral argument, rendered an oral opinion reversing the FEPC's decision. The decision of the Circuit Court of Cook County was then appealed by Respondent to the Illinois Appellate Court which reinstated the FEPC's decision after a thorough and comprehensive review of the record. *Unger* v. *Sirena Division of Consolidated Foods Corporation,* 60 Ill. App. 3d 840, 18 Ill. Dec. 113, 377 N. E. 2d 266 (1978). Petitioner's subsequent petition for leave to appeal to the Illinois Supreme Court was denied.

While the case was pending before the Illinois Appellate Court, but before a decision had been rendered, Petitioner brought suit against Respondent in the United States District Court for the Northern District of Illinois under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), based on precisely the same claims of discrimination involved in the state court proceedings. In 1980, following the Illinois Appellate Court's decision in favor of Respondent and the denial of Petitioner's motion for leave to appeal to the Illinois Supreme Court, Respondent moved for summary judgment in the Federal District Court, contending that Petitioner's federal suit was barred by the preclusion doctrines of *res judicata* and collateral estoppel. Respondent's motion was denied by Judge Stanley J. Roszkowski on March 10, 1980 and thereafter the case proceeded to trial before Judge Joseph Sam Perry, who found for Petitioner on the issue of liability and adopted Petitioner's proposed findings of fact on her substantive claims *verbatim.*

On Respondent's subsequent appeal, the Seventh Circuit affirmed the District Court's denial of Respondent's motion for summary judgment on the preclusion issue as well as the District Court's finding on the merits. *Unger* v. *Consolidated Foods Corporation,* 657 F. 2d 909 (7th Cir. 1981), *vacated and remanded,* ___ U. S. ___, 102 S. Ct. 2288 (1982). Respondent then petitioned this Court for a Writ of Certiorari, which was granted on June 1, 1982. *Consolidated Foods Corporation* v. *Unger,* ___ U. S. ___, 102 S. Ct. 2288 (1982). Simultaneous with its granting of the Writ, this Court vacated the Seventh Circuit's decision and remanded the case for reconsideration in light of *Kremer* v. *Chemical Construction Corporation,* 456 U. S. 461, 102 S. Ct. 1883 (1982) ("*Kremer*").

On remand, the Seventh Circuit reversed its prior decision, holding that *Kremer* governed this case because (1) the same claims of discrimination were litigated in the state and federal proceedings, (2) the Illinois processes satisfied the due process

requirements set forth in *Kremer* and afforded Petitioner a "full and fair opportunity" to litigate her claims of discrimination, and (3) the final judgment of the Illinois Appellate Court would be accorded preclusive effect by the Illinois courts. *Unger* v. *Consolidated Foods Corporation,* 693 F. 2d 703, 705-06 (7th Cir. 1982). Additionally, the Seventh Circuit applied the tests set forth by this Court in *Chevron Oil Company* v. *Huson,* 404 U. S. 97 (1971) ("*Chevron Oil*"), and rejected Petitioner's contention that special circumstances exist which would warrant prospective-only application of *Kremer.*

REASONS FOR DENYING THE WRIT

I. The Petition For Writ of Certiorari Raises No Issues Which Warrant Review For Any of the Reasons Set Forth In Rule 17 Of The Rules Of This Court

The Petition raises no unsettled issues of federal law; nor does it allege that the Seventh Circuit's decision on remand conflicts with any applicable decisions of this Court or another Court of Appeals. Instead, the Petition merely contends that the Seventh Circuit "erroneously" applied the standards previously developed by this Court for determining (1) the preclusive effect of state court judgments in Title VII actions (*Kremer*), and (2) the retrospective application of this Court's decisions in civil actions (*Chevron Oil*). Such alleged "misapplication" is, however, insufficient grounds for this Court to grant review, especially given Petitioner's admission in her "Memorandum Statement on Remand to the Seventh Circuit" that "[t]he posture of the *Unger* case is relatively unique and is unlikely to be repeated in any other case" (Petitioner's Memorandum Statement on Remand, p. 16).

Simply stated, as the Petition raises no conflict and no important unsettled issue, but merely seeks review of a decision which will affect very few, if any, litigants other than this Petitioner, the Petition should be denied.

II. The Seventh Circuit Correctly Held That This Court's Decision in *Kremer* v. *Chemical Construction Corporation*, 456 U. S. 461, 102 S. Ct. 1883 (1982), Controlled This Case, Because the Final Decision of the Illinois Appellate Court on Petitioner's Claims of Discrimination Would Be Accorded Preclusive Effect by the Illinois State Courts, and Because the State Processes Satisfied the Minimum Requirements of the Fourteenth Amendment's Due Process Clause

In *Kremer*, this Court held that a state court's administrative review of a state agency's rejection of an employment discrimination charge as meritless is entitled to preclusive effect by the federal courts, provided that: a) such effect would be accorded by the state's own courts; and b) the state processes satisfy minimum due process requirements. Remarkably, Petitioner now contends that the Seventh Circuit erred on remand by holding that *Kremer* controlled this case because, according to Petitioner, this Court intended *Kremer* to apply only to cases where the state court makes a *de novo* review of the evidence presented to the state administrative agency:

> By contrast, *Kremer* was a decision based on a judicial determination that there was no discrimination—based on all of the uncontroverted facts.

(Petition, p. 28)

As the Seventh Circuit correctly recognized, however, this Court, in *Kremer*, rejected the very same contention now advanced by Petitioner. In *Kremer*, the New York court plainly applied a deferential standard of review, *i.e.*, whether the agency's action was "arbitrary and capricious." 102 S. Ct. at 1888-89. Nonetheless, this Court made clear that there was no requirement that a state court's review proceed *de novo* to be entitled to preclusive effect by the federal courts:

> It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect . . . There is no requirement that judicial review proceed *de novo* if it is to be preclusive.

102 S. Ct. at 1896, n. 21 (Citations omitted)

Here, the Illinois Appellate Court reviewed the FEPC's decision and determined that it was not "contrary to the manifest weight of the evidence." 377 N. E. 2d at 270-71. As aptly noted by the Seventh Circuit on remand, there is no "practical difference" between the standards of review employed by the Illinois and New York courts. 693 F. 2d at 706. Indeed, as the Seventh Circuit further observed, while Kremer's charge was dismissed by the New York agency without a hearing, the Illinois processes afforded Petitioner a full evidentiary hearing, accompanied by a panoply of procedural safeguards, which fully satisfied the due process requirements set forth in *Kremer*. 613 F. 2d at 705-06.

In sum, *Kremer* could not conceivably be interpreted as not governing this case, either on the basis of the state processes afforded Petitioner or the standard of review employed by the Illinois Appellate Court, and the Seventh Circuit correctly so held.

III. The Seventh Circuit Correctly Applied the Standards Set Forth by This Court in *Chevron Oil Company* v. *Huson*, 404 U. S. 97 (1971), And Held That No Exception To The General Principle of Retroactivity Was Warranted Herein

In *Chevron Oil*, this Court declined to apply retroactively its holding in *Rodrique* v. *Aetna Casualty & Surety Company*, 395 U. S. 352 (1962) ("*Rodrique*") that state law rather than admiralty law governs tort claims brought under the Outer Continental Shelf Lands Act, where retrospective application would have deprived the plaintiff of the right to bring any

action whatsoever on his claims. In so doing, this Court set forth three factors which must be established before a decision is applied prospectively-only:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U. S. at 106-07. As the Seventh Circuit correctly held on remand, Petitioner's arguments for nonretroactive application of *Kremer* satisfy none of the *Chevron Oil* factors, let alone all three.

With respect to whether *Kremer* overruled "clear past precedent," the Seventh Circuit correctly observed that, prior to *Kremer*, "any clarity [Petitioner] sees is largely a product of wishful thinking." 693 F. 2d at 708. Prior to *Kremer*, no decision of either this Court or the Seventh Circuit had considered whether the preclusion doctrines barred a Title VII action in federal district court when the plaintiff previously had received an adverse state court determination on his/her claims of employment discrimination. The only Court of Appeals which had considered the issue was the Second Circuit, which held that prior state court judgments on claims of discrimination were entitled to preclusive effect in the federal courts. *See, Kremer* v. *Chemical Construction Corporation*, 623 F. 2d 786 (2d Cir. 1980); *Sinicropi* v. *Nassau County*, 601 F. 2d 60 (2d Cir. 1979), *cert. denied*, 444 U. S. 983 (1979).

Likewise, *Kremer* was not "an issue of first impression whose resolution was not clearly foreshadowed." In *Chevron Oil,* the fact that the plaintiff justifiably had relied on prior decisions in determining that his suit could be timely commenced under the admiralty doctrine of laches convinced this Court that its holding in *Rodrigue,* which truly was a case of first impression in this Court, should not be applied retrospectively to bar his action. Here, on the other hand, the issue regarding the role of the preclusion doctrines in Title VII actions simply had not arisen when Petitioner appealed the FEPC's decision to the Illinois state courts. Nonetheless, the "first impression" aspect of the *Chevron Oil* is not applicable where, as here, an existing principle of law—the preclusion doctrines and § 1738—is simply applied to a new factual situation. *See, e.g., Kremer* v. *Chemical Construction Corporation,* 623 F. 2d at 789. As the Seventh Circuit reasoned, moreover, Petitioner took her appeal to the state courts at a time when there was no conflict among the circuits in need of resolution. 693 F. 2d at 709. Unlike the plaintiff in *Chevron Oil,* therefore, Petitioner is hard-pressed "to argue reliance when [she] could have done no better than a coin toss in predicting how the Title VII override issue would come out." 693 F. 2d at 709.

Petitioner similarly cannot establish the existence of either the second or third *Chevron Oil* tests. As explained by the Seventh Circuit, this Court decided in *Kremer* that Title VII did not effect a partial repeal of 29 U.S.C. § 1738; that is, as a matter of comity, federal courts must accord preclusive effect to state court judgments on claims of discrimination. 693 F. 2d at 710. Thus, applying *Kremer* prospectively only and not according preclusive effect to the decision of the Illinois Appellate Court plainly would be contrary to the principles of comity on which *Kremer* is based. Moreover, as the essence of the preclusion doctrines of collateral estoppel and *res judicata* is "finality," prospective-only application of *Kremer* would retard rather than further the operation of that decision by allowing all

pre-*Kremer* plaintiffs whose claims of discrimination have been rejected by state courts to seek contrary decisions in the federal courts.

Lastly, retrospective application of *Kremer* would work no "substantial inequity" on Petitioner who, unlike the plaintiff in *Chevron Oil,* received a "full and fair opportunity" to litigate her claims before the FEPC and state courts—an opportunity which she fully exploited. For this very reason, Petitioner's attempt to rely on *Logan* v. *Zimmerman Brush Company,* ____ U. S. ____, 102 S. Ct. 1148 (1982) ("*Logan*"), an argument she did not present to the Seventh Circuit on remand, must fail. There, this Court held that the plaintiff had been unconstitutionally deprived of a protected property right when he was held to have forefeited his right to have the merits of his claims considered because of the state agency's failure to schedule a timely fact-finding conference. Here, on the other hand, it was Petitioner's voluntary appeal to the Illinois state courts which, under *Kremer,* ultimately resulted in the loss of her right to receive a federal court trial on her claims. As this Court made clear in *Logan,* its analysis in that case is inapplicable when the plaintiff's own action results in the loss of the right to have claims considered. 102 S. Ct. at 1157-58. More importantly, of course, retrospective application of *Kremer* plainly does not deprive Petitioner of any putative property interest in having her claims considered, because those claims were considered fully and comprehensively by the FEPC and the Illinois state courts.

CONCLUSION

As the Petition for Writ of Certiorari suggests no issues warranting review under Rule 17 of the Rules of this Court, and as the Seventh Circuit's decision on remand was fully consonant with the applicable decisions of this Court, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: March 28, 1983